No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve process upon the head of the ministry of foreign affairs under 28 U.S.C. §1608(a)(3) by a mailing "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C.

PARTIES TO THE PROCEEDING

The Republic of the Sudan, petitioner on review, was the defendant-appellant below.

The following individuals, respondents on review, were the plaintiffs-appellees below: Rick Harrison, John Buckley III, Margaret Lopez, Andy Lopez, Keith Lorensen, Lisa Lorensen, Edward Love, Robert McTureous, David Morales, Gina Morris, Martin Songer Jr., Shelly Songer, Jeremy Stewart, Kesha Stidham, Aaron Toney, Eric Williams, Carl Wingate, and Tracey Smith as personal representative of the Estate of Rubin Smith.

Mashreqbank, BNP Paribas, National Bank of Egypt, and Crédit Agricole Corporate and Investment Bank, respondents on review, were respondents below.

A list of additional parties to this proceeding is set forth in the Addendum to this Brief. Pursuant to Rule 12.6 of this Court, Sudan states that it does not believe that these additional parties have an interest in the outcome of this case.

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Biswanath Sen, *A Diplomat's Handbook of International Law & Practice* (3d ed. 1988) 35

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BRIEF FOR PETITIONER

Petitioner the Republic of the Sudan, a "foreign state" within the meaning of 28 U.S.C. §1603(a), respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Second Circuit and hold that the March 30, 2012 default judgment against Sudan is void for lack of personal jurisdiction under 28 U.S.C. §1330(b) due to improper service of process.

OPINIONS BELOW

The opinion of the Second Circuit (JA168-179) is reported at 802 F.3d 399. The Second Circuit's denial of panel rehearing (JA207-230) is reported at 838 F.3d 86. The Second Circuit's denial of rehearing en banc is unreported but reproduced at JA231-232.

The turnover orders entered by the U.S. District Court for the Southern District of New York are unreported but reproduced at JA149-164.

The opinion supporting the default judgment entered against Sudan by the U.S. District Court for the District of Columbia (JA84-139) is reported at 882 F. Supp. 2d 23. The default judgment is reproduced at JA81-83.

JURISDICTION

The Second Circuit entered judgment on September 23, 2015. Sudan's timely petition for panel rehearing was denied on September 22, 2016. Sudan's timely petition for rehearing en banc was denied on December 9, 2016. Sudan timely petitioned this Court for a writ of certiorari on March 9, 2017.

See 28 U.S.C. §2101(c); Sup. Ct. R. 13.1, 13.3. This Court granted Sudan's petition on June 25, 2018.

This Court has jurisdiction to review the Second Circuit's decision under 28 U.S.C. §1254(1).

PROVISIONS INVOLVED

The relevant provisions of the U.S. Code and of the Vienna Convention on Diplomatic Relations are set forth in the Addendum to this Brief.

INTRODUCTION

This case concerns the requirements for valid service of process upon a foreign state under the U.S. Foreign Sovereign Immunities Act ("FSIA"). Specifically, this case concerns a particular subsection of the FSIA, 28 U.S.C. §1608(a)(3), which in certain circumstances authorizes service of process on a foreign state "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." Here, the Second Circuit held that §1608(a)(3) is satisfied by a mailing that names the minister of foreign affairs as the recipient but that is sent to the address of the foreign state's embassy in Washington, D.C., rather than to the address of the ministry of foreign affairs in the foreign state's capital. The Second Circuit's holding, which departs from the holdings of other courts of appeals, is contrary to the intent of Congress in enacting §1608(a)(3).

First and foremost, the natural reading of §1608(a)(3) is that process must be mailed to the official office of the head of the ministry of foreign

affairs in the foreign state's capital. The operative statutory language, requiring that the mailing be "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned," is naturally understood to require that the mailing be sent to the address of the head of the ministry in the foreign state without going through an intermediary such as the foreign state's embassy in Washington, D.C. Other statutory language reinforces this natural reading; for example, §1608(a)(3)'s requirement of a "form of mail requiring a signed receipt" supports the natural reading, because a signed receipt from an intermediary does not confirm delivery to the ultimate intended recipient, the head of the ministry of foreign affairs.

Furthermore, the Vienna Convention on Diplomatic Relations, which entered into force with respect to the United States on December 13, 1972, has long been understood to prohibit service upon *or through* a diplomatic mission. *See* Vienna Convention on Diplomatic Relations, art. 22(1), opened for signature Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention] (providing that "[t]he premises of the mission shall be inviolable"). The Convention constitutes U.S. law in its own right, and also creates obligations on the part of the United States toward its treaty partners such as Sudan. As such, the FSIA should be interpreted as consistent with the Convention.

The FSIA's legislative history makes clear that Congress purposefully undertook to craft §1608(a)(3) to comport with the Vienna Convention and specifically with its prohibition on service upon or

through a diplomatic mission. Indeed, Congress modified an early draft of the service provisions to *exclude* a mailing to the ambassador or chief of mission of the foreign state precisely to ensure that the provisions comported with the Convention in this respect.

Since the enactment of the FSIA, the United States, mindful of its international treaty obligations and hopeful to avoid diplomatic friction and reciprocal treatment abroad, has consistently expressed the view that §1608(a)(3) does not authorize service upon or through the diplomatic missions of foreign states. The United States has expressed that position repeatedly in this case, including to this Court.

In the ruling under review here, the Second Circuit acknowledged that §1608(a)(3) does not authorize service *upon* a foreign state's diplomatic mission, such as Sudan's Embassy in Washington. But the Second Circuit accepted Plaintiffs' argument that they had not served process *upon* the mission, but rather had served Sudan (or the head of its ministry of foreign affairs) "via" or "care of" the Embassy. This distinction is specious; simply naming the head of Sudan's Ministry of Foreign Affairs as the recipient does not transform a mailing "addressed and dispatched" to Sudan's Embassy into one "addressed and dispatched" to him. Such a tactic cannot defeat the intention of Congress to preclude service upon — or through — a foreign state's diplomatic mission.

STATEMENT OF THE CASE

On October 12, 2000, terrorists bombed the U.S.S. *Cole* as it was refueling in the Port of Aden, Yemen, killing seventeen U.S. sailors and injuring at least forty others. The terrorist organization al Qaeda and its leader Osama Bin Laden claimed responsibility for the heinous attack.

Nearly a decade later, on October 4, 2010, fifteen of the injured sailors and three of their spouses brought suit in the U.S. District Court for the District of Columbia under the FSIA's terrorism exception, 28 U.S.C. §1605A, seeking to hold Sudan liable for their injuries resulting from the bombing. Plaintiffs alleged that al Qaeda carried out the attack, but that Sudan had provided al Qaeda and Bin Laden with "material support" that purportedly caused the attack.

Sudan, a sovereign nation in northeastern Africa, has been riven with civil war, natural disasters, and humanitarian crises for decades. The long-running Sudanese civil war resulted in the cession of southern Sudan to the new independent nation of South Sudan in 2011. Relations between Sudan and the United States have been strained at times, with Sudan being subject to various U.S. sanctions over the years. But Sudan and the United States have maintained diplomatic relations throughout. In recent years, relations between the two countries have warmed, and the United States has ended nearly all economic sanctions programs targeting Sudan. Sanctions Action Pursuant to Executive Order 13067 and Executive Order 13412, 82 Fed. Reg. 49,698 (Oct. 26, 2017). Although Sudan remains designated by the

United States as a state sponsor of terrorism, Sudan continues to work closely with the United States "on addressing regional conflicts and the threat of terrorism." Press Release, U.S. Dep't of State, Sanctions Revoked Following Sustained Positive Action by the Gov't of Sudan (Oct. 6, 2017).

Sudan acknowledges that Bin Laden resided in Sudan as a private citizen in the mid-1990s, until Sudan permanently expelled him in 1996. But Sudan vehemently denies the allegations that it provided "material support" to Bin Laden or al Qaeda or caused the attack on the *Cole*. Furthermore, Bin Laden was not yet an infamous terrorist while he resided in Sudan; Bin Laden was not designated as a terrorist by the United States until 1998 and al Qaeda was not designated by the United States as a terrorist organization until 1999. *See* Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process, Exec. Order No. 13099, 63 Fed. Reg. 45,167 (Aug. 20, 1998) (designating, for the first time, Bin Laden as a terrorist who threatens to disrupt the Middle East peace process); Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (Oct. 8, 1999) (designating, for the first time, al Qaeda as foreign terrorist organization). Sudan maintains that it should be given the opportunity to defend itself against the serious, but baseless, allegations that underlie this action.

I. District Court Proceedings (D.D.C.)

To effect service of process on Sudan, on November 5, 2010, Plaintiffs filed an "Affidavit Requesting Foreign Mailing" asking the Clerk of the

D.C. District Court to mail process (i.e., a summons, complaint, and notice of suit) pursuant to 28 U.S.C. §1608(a)(3). JA69-70.

On November 17, 2010, the Clerk sent the service package via certified mail, return receipt requested, to the address specified in Plaintiffs' Affidavit:

> Republic of Sudan
> Deng Alor Koul
> Minister of Foreign Affairs
> Embassy of the Republic of Sudan
> 2210 Massachusetts Avenue NW
> Washington, DC 20008

JA69, 73-74; *see also* JA71-72 (Certificate of Mailing).

The record does not show that the service package was ever delivered to the Sudanese Embassy. JA75 (showing the package was delivered not to the Sudanese Embassy in Washington, but, curiously, to "Charlotte Hall, Maryland" on November 18, 2010). The record also does not show that the package was ever forwarded to the head of the Ministry of Foreign Affairs in Khartoum, Sudan's capital. Mr. Deng Alor Kuol was not, in fact, the Minister of Foreign Affairs of Sudan at the time the package was sent. *See* U.N. Protocol & Liaison Serv., *Heads of State, Heads of Government, Ministers for Foreign Affairs*, at 55 (Sept. 22, 2012) (identifying Mr. Ali Ahmed Karti as Sudan's Minister of Foreign Affairs and identifying Mr. Karti's "Date of Appointment" as June 16, 2010).

A return receipt, containing an illegible signature, was returned to the Clerk on November 23, 2010. JA74. The return receipt did not contain the printed

name of the signatory, or an indication of the date of delivery. *Id.* Plaintiffs made no attempt to serve Sudan (or the head of Sudan's Ministry of Foreign Affairs) by any mailing to Khartoum.

Sudan did not appear in the action, Plaintiffs moved for entry of default on January 18, 2011, and the Clerk entered a default against Sudan on January 19, 2011. JA80. On March 30, 2012, following a hearing, the D.C. District Court entered a default judgment against Sudan, finding jurisdiction and liability and awarding compensatory and punitive damages in the amount of $314,705,896. JA81-85.

In an attempt to comply with 28 U.S.C. §1608(e)'s requirement that any default judgment against a foreign state be served upon the foreign-state defendant, Plaintiffs on April 19, 2012, filed another Affidavit Requesting Foreign Mailing to effectuate service of the default judgment upon Sudan, in accordance with §1608(a)(3). JA140-141. Again, the package named Mr. Deng Alor Kuol as the recipient, but was sent by return-receipt mail to Sudan's Embassy in Washington, D.C. JA173.

II. District Court Proceedings (S.D.N.Y.)

Plaintiffs registered the default judgment in the U.S. District Court for the Southern District of New York in order to execute upon the default judgment in that court's jurisdiction. JA173. Plaintiffs petitioned for turnover of assets from respondent banks, which were holding funds blocked pursuant to the then-effective Sudanese Sanctions Regulations (31 C.F.R. Part 538). JA173. The S.D.N.Y. District Court

granted several of the petitions, issuing turnover orders on December 12, 2013, December 13, 2013, and January 6, 2014, in partial satisfaction of the default judgment. JA149-164.

Sudan appeared in the enforcement action, and, on January 13, 2014, timely appealed all three turnover orders. JA165-167.

While the appeal was pending, on June 14, 2015, Sudan moved in the D.C. District Court to vacate the default judgment under Rule 60(b) of Federal Rules of Civil Procedure, for, among other reasons, lack of personal jurisdiction owing to a failure to serve process in accordance with §1608(a)(3). *See* JA172-173 n.2. Sudan also moved to stay the appeal in the Second Circuit until the D.C. District Court ruled on the motion to vacate. *Id.* The Second Circuit denied a stay, and the motion to vacate in the D.C. District Court remains pending.

III. Second Circuit Appeal

On appeal of the turnover orders, Sudan's principal argument was that the default judgment was invalid because Sudan had not been served with process in the D.C. District Court action in accordance with §1608(a)(3), and the S.D.N.Y. District Court thus lacked any basis to grant the turnover petitions.

On September 23, 2015, the Second Circuit affirmed the S.D.N.Y. District Court's turnover orders, concluding that "[n]othing in §1608(a)(3) requires that the papers be mailed to a location in the foreign state, and the method chosen by plaintiffs —

a mailing addressed to the minister of foreign affairs at the embassy — was consistent with the language of the statute and could reasonably be expected to result in delivery to the intended person." JA179. The Second Circuit recognized that service on a diplomatic mission, such as the Sudanese Embassy, was prohibited by §1608(a)(3) and the Vienna Convention, but found that prohibition inapplicable: "In this case, service was directed to the right individual, using the Sudanese Embassy address for transmittal. Process was not served on the foreign mission; rather, process was served on the Minister of Foreign Affairs via the foreign mission." JA182.

IV. Petition For Rehearing

On October 7, 2015, Sudan petitioned for rehearing or rehearing en banc, and, on November 6, 2015, the United States submitted a brief as amicus curiae in support of Sudan's petition.

The United States argued that the Second Circuit's holding "runs contrary to the FSIA's text and history, and is inconsistent with the United States' international treaty obligations and international practice." JA198. The United States argued that the plain text of §1608(a)(3) requires a mailing to the foreign state's capital: "The most natural understanding of that text is that the mail will be sent to the head of the ministry of foreign affairs at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government — not to some other location for forwarding." JA199. The United States added that, under the Vienna Convention, "the premises of the [diplomatic] mission shall be inviolable," and that

"[t]he intrusion on a foreign embassy is present whether it is the ultimate recipient or merely the conduit of a summons and complaint." JA202-203 (citing Vienna Convention, art. 22). The United States also warned of "strong reciprocity interests at stake," because it rejects any attempt at service made upon the United States abroad "through an embassy." JA203-204.

On March 11, 2016, the Second Circuit panel held oral argument on the petition for rehearing, and counsel for Sudan and the United States each advocated for rehearing, while counsel for plaintiffs argued otherwise. JA207.

In an opinion dated September 22, 2016, the panel denied rehearing. In doing so, the panel stated: "We acknowledge that the statutory interpretation question presents a close call, and that the language of §1608(a)(3) is not completely clear." JA213. The panel added: "On its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs." JA213. The panel found "unpersuasive" the argument of the United States (and Sudan) that §1608(a)(3) is most naturally read as requiring that the service package be sent to the head of the ministry at his or her regular place of work, i.e., the ministry in the foreign state's capital. JA215. The panel also reiterated its view that its holding was not inconsistent with the prohibitions of §1608(a)(3) and the Vienna Convention against service "on" a diplomatic mission: "There is a significant difference between *serving process* on an embassy, and mailing

papers to a country's foreign ministry *via* the embassy." JA216 (emphasis in original); JA222. The panel expressed "some reluctance" over diverging from the Executive Branch's interpretation of the Vienna Convention. JA225.

In its opinion denying rehearing, the panel also held for the first time that the purported acceptance by the Sudanese Embassy of Plaintiffs' service package constituted "consent" to entry onto its premises within the meaning of Article 22(1) of the Vienna Convention on Diplomatic Relations. JA223. To reach this conclusion, the panel made a new factual finding, that "[i]nstead of rejecting the service papers, Sudan accepted them and then, instead of returning them, it explicitly acknowledged receiving them." *Id.* Sudan sought leave to file a Supplemental Petition in support of its pending Petition for Rehearing En Banc, arguing that the panel's new finding constructively amended the panel's underlying Opinion. JA62-63. The panel denied that request. JA63-64.

On December 9, 2016, the Second Circuit issued an order denying rehearing en banc. JA231-232.

SUMMARY OF ARGUMENT

I. The natural reading of 28 U.S.C. §1608(a)(3), by its terms and in the context of the FSIA as a whole, is that it requires the service package to be mailed to the head of the ministry of foreign affairs at his or her official office in the foreign state's capital. By requiring the package to be "addressed and dispatched . . . to" the head of the ministry, §1608(a)(3) is naturally read to require the package

to be sent to the address of the head of the ministry and not to some supposed agent or other intermediary, such as a diplomatic mission. Other provisions of §1608 expressly permit deliveries to agents or intermediaries in specified circumstances, so the omission of such permission in §1608(a)(3) is conspicuous and must be taken as purposeful. The Executive Branch and the courts have generally understood §1608(a)(3) to require mailing to the head of the ministry in the foreign state's capital, and to foreclose mailing of the service package to the foreign state's diplomatic mission in Washington, D.C.

II. Article 22 of the Vienna Convention reinforces the natural reading of §1608(a)(3) and, indeed, provides an independent basis for precluding service on, "through," "via," or "care of" a diplomatic mission. The United States and Sudan are both signatories to the Vienna Convention, which is self-executing and has been implemented by Congress (and even extended by Congress to protect the diplomatic missions of non-signatories). The United States agrees that §1608(a)(3) and Article 22 of the Vienna Convention do not permit service by mail on or through a diplomatic mission. These views of the United States are entitled to great weight and substantial deference. *See Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (recognizing the "well-established canon of deference" that the "Executive Branch's interpretation of a treaty is entitled to great weight" (internal quotation marks omitted)); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (requiring deference to treaty interpretation by treaty parties "absent extraordinarily strong contrary evidence").

The inviolability provisions of Article 22 constitute bedrock principles of international diplomacy, are enshrined in international law and practice, and are widely accepted in the United States and beyond as prohibiting service by mail on or through a diplomatic mission. *See, e.g., 767 Third Ave. Assocs. v. Perm. Mission of Zaire to the U.N.*, 988 F.2d 295, 299-300 (2d Cir. 1993) (tracing history of inviolability principle under international law and Article 22 of the Vienna Convention); *Kumar v. Republic of Sudan*, 880 F.3d 144 (4th Cir. 2018) (holding that Vienna Convention's inviolability provision prohibits application of §1608(a)(3) in a manner that would allow "service delivered to the foreign nation's embassy in the United States").

III. While resort to the legislative history of §1608(a)(3) is not necessary, it confirms Congressional intent to preclude service on or through a diplomatic mission. The history shows that an early version of the FSIA included mailing to an ambassador (or other head of mission) as part of one service method. But that version was changed out of concern that it would violate the Vienna Convention. Section 1608(a)(3), as enacted, was intended by Congress to conform to the protections afforded diplomatic missions under Article 22 of the Vienna Convention. The United States agrees that the legislative history reflects the unmistakable intent of Congress to prevent service on or through a foreign state's diplomatic mission.

IV. The views of the United States on §1608(a)(3) and the Vienna Convention are particularly significant because important principles of

international comity and reciprocity are at stake: an interpretation of the FSIA that places the United States in violation of its treaty obligations under the Vienna Convention would be an affront to other nations and would create friction in the Executive Branch's conduct of foreign relations. Moreover, the United States, which is sued frequently in courts around the world, routinely disavows the validity of service upon its own foreign missions. Placing the United States in violation of its treaty obligations on this point would deprive the United States of an important defense that service on its own foreign missions violates international law.

* * *

The Second Circuit acknowledged that the Vienna Convention prohibits service on a diplomatic mission, and that §1608(a)(3) was intended to comport with the Vienna Convention. Nevertheless, the Second Circuit endorsed Plaintiffs' facile circumvention of the prohibition. By permitting service by mail to a diplomatic mission simply because the mailing identifies the minister of foreign affairs as the recipient, the Second Circuit opinion conflicts with the strict requirements of §1608(a)(3) and with Article 22 of the Vienna Convention. The Second Circuit failed to appreciate that service of process is a formal and coercive assertion of sovereignty, and that service of process delivered to a diplomatic mission is a serious infringement upon the sovereignty and independence of the foreign state.

ARGUMENT

In 1976, Congress enacted the FSIA, which codifies "a doctrine that by and large continues to reflect basic principles of international law, in particular those principles embodied in what jurists refer to as the 'restrictive' theory of sovereign immunity." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017); *see* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§1330, 1391(f), 1441(d), and 1602-1611 (2012 & 2018 Supp.)) ("An Act to define the jurisdiction of United States courts in suits against foreign states . . . ."). The Department of State assisted in drafting the FSIA and advised Congress that the FSIA was drafted in line with the current state of international law to "diminish the likelihood that other nations would each go their own way, thereby 'subject[ing]' the United States 'abroad' to more claims 'than we permit in this country.'" *Helmerich*, 137 S. Ct. at 1320 (alteration in original).

This Court has held repeatedly that the FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Samantar v. Yousuf*, 560 U.S. 305, 314 (2010). Through 28 U.S.C. §1604, the FSIA presumes that a foreign state enjoys immunity from subject-matter jurisdiction in federal and state courts in the United States, subject to specified exceptions. *See Helmerich*, 137 S. Ct. at

1319-20 ("[T]he FSIA starts from a premise of immunity and then creates exceptions to the general principle." (internal quotation marks omitted)); *see also* 28 U.S.C. §1330(a) (providing that the district courts shall have original jurisdiction over civil actions against a foreign state "with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement").

To obtain personal jurisdiction over a foreign state, an exception to immunity must apply and service of process must be made under 28 U.S.C. §1608(a). *See* 28 U.S.C. §1330(b). Section 1608(a) prescribes the exclusive methods for serving a foreign state (or a political subdivision of a foreign state) in U.S. litigation. *See* 28 U.S.C. §1330(b) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) *where service has been made under section 1608 of this title.*" (emphasis added)); 28 U.S.C. §1608(a) ("Service in the courts of the United States and of the States *shall* be made upon a foreign state or political subdivision of a foreign state [in accordance with enumerated methods]" (emphasis added)); Fed. R. Civ. P. 4(j)(1) ("A foreign state or its political subdivision, agency, or instrumentality *must* be served in accordance with 28 U.S.C. §1608" (emphasis added)); *see also Kumar v. Republic of Sudan*, 880 F.3d 144, 154 (4th Cir. 2018) (stating that §1608(a) provides "the exclusive and explicit means" for serving a foreign state); *Magness v. Russian Federation*, 247 F.3d 609, 615 (5th Cir. 2001) (stating that "§1608(a) sets forth the

exclusive procedures for service on a foreign state" (internal quotation marks omitted)).

The service provisions under §1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute." *Magness*, 247 F.3d at 613; *see also Barot v. Embassy of Zambia*, 785 F.3d 26, 27 (D.C. Cir. 2015) ("The Act provides four methods of service in descending order of preference.").

First, service must be attempted on a foreign state pursuant to any "special arrangement for service between the plaintiff and the foreign state," typically one found in a contract. 28 U.S.C. §1608(a)(1); *see Bluth v. Islamic Republic of Iran*, 203 F. Supp. 3d 1, 18 (D.D.C. 2016) ("The first preference is for 'any special arrangement[s]' for service between the plaintiff and the foreign state (i.e. a contract provision)." (alteration in original)).

Second, if the parties lack a "special arrangement for service," then service must be attempted "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. §1608(a)(2). Applicable international conventions are those "to which the United States and the foreign state are parties." Restatement (Third) of the Foreign Relations Law of the United States §457 cmt. b (Am. Law Inst. 1987). (The United States is a party to three such conventions: the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163; the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S.

Treaty Doc. No. 98-27, 1438 U.N.T.S. 288; and the Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 1438 U.N.T.S. 322.)

Third, if service cannot be made under the first two methods, then service must be attempted under the method at issue here: "[A]ny form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. §1608(a)(3).

Fourth and finally, if service cannot be achieved under §1608(a)(3) within 30 days, then service must be made through diplomatic channels, with the assistance of the U.S. Department of State. *Id.* §1608(a)(4); *see also* 22 C.F.R. §93.1 (describing the procedures for "[s]ervice through the diplomatic channel").

These provisions for serving a foreign state (or a political subdivision thereof), found within §1608(a), differ in certain material respects from the FSIA's provisions for serving an "agency or instrumentality" of a foreign state, found within §1608(b). Section 1608(b)'s first method, under §1608(b)(1), is similar to §1608(a)(1) in requiring service in accordance with "any special arrangement for service" between the plaintiff and the agency or instrumentality. The next method, under §1608(b)(2), requires service either in accordance with an "applicable international convention," like §1608(a)(2), or by delivery "to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." And finally,

§1608(b)(3) differs from §1608(a)(3) by requiring service, "if reasonably calculated to give actual notice," by delivery according to one of three methods: as directed by an authority of the foreign state; by mail "to the agency or instrumentality to be served"; or as directed by the court consistent with the law of the place of service. Section 1608(b) does not provide for service upon an agency or instrumentality through diplomatic channels, and therefore lacks an analogue to §1608(a)(4).

Because §1608(b)(3) provides for some flexibility in the method of service, as long as the method is "reasonably calculated to give actual notice," courts have held that service under subsection (b) requires only "substantial compliance" with its terms, whereas §1608(a)(3), lacking any reference to actual notice, requires "strict compliance." *See, e.g., Kumar*, 880 F.3d at 154 (observing that "based on §1608(a)'s four precise methods for service of process and how that language contrasts with §1608(b), subsection (a) requires strict compliance"); *Magness*, 247 F.3d at 615-16 (holding that the service-of-process procedures "outlined in section 1608(a) can *only* be satisfied by strict compliance" and acknowledging §1608(b)'s "reference to actual notice is absent from section 1608(a)" (emphasis added)); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) (holding that "section 1608(a) *mandates* service of the Ministry of Foreign Affairs" and recognizing that "section 1608(a) says nothing about actual notice" (emphasis added)).

Here, the parties do not dispute that service in conformity with the first two methods of §1608(a) was

not possible, because Plaintiffs have no "special arrangement for service" with Sudan, and because Sudan is not a party to any "international convention on service of judicial documents" to which the United States is a party. JA177; 28 U.S.C. §1608(a)(1)-(2). Accordingly, Plaintiffs were required to serve Sudan in "strict compliance" with the third method of service under §1608(a) — by sending process "by any form of mail requiring a signed receipt, to be *addressed and dispatched* . . . *to* the head of the ministry of foreign affairs of the foreign state." 28 U.S.C. §1608(a)(3) (emphasis added).

I. The Text Of §1608(a)(3) Is Naturally Read To Require That Process Be Mailed To The Head Of The Ministry Of Foreign Affairs In The Foreign State

Interpreting the provisions of the FSIA "starts 'where all such inquiries must begin: with the language of the statute itself.'" *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)). This Court recently instructed that interpretation of a provision of the FSIA first involves an examination of the "natural reading" of the provision at issue. *See Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823, 826 (2018) (rejecting petitioners' "strained and unnatural reading" of a phrase in 28 U.S.C. §1610(g)). The natural reading of the statutory text considers the pertinent text of the statute in the context of its overall statutory scheme. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 44 (2008) ("It is a fundamental canon of statutory construction that the words of a

statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Davis v. Mich. Dep't of Treas.*, 489 U.S. 803, 809 (1989))); *Samantar*, 560 U.S. at 319 (interpreting the FSIA: "We do not construe statutory phrases in isolation; we read statutes as a whole.").

Section 1608(a)(3) requires service of process "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The natural reading of this statutory text is that process must be sent to the address of the head of the ministry of foreign affairs in the foreign state. A mailing is not naturally understood to be "addressed and dispatched" to a specified person if it names the person as the recipient but is sent to an address other than the person's address. The statutory requirement of a signed receipt reinforces that §1608(a)(3) contemplates a mailing to the address of the head of the ministry; a signed receipt cannot verify delivery to the head of the ministry if the mailing is sent, not to the address of the head of the ministry, but to the address of an intermediary, where the intermediary signs the return receipt.

This natural reading is further confirmed by §1608(c)(2), which provides that "[s]ervice shall be deemed to have been made . . . as of the date of receipt indicated in the . . . signed and returned postal receipt . . . ." Deeming service to have been made as of the date of receipt indicated on the signed and returned postal receipt makes sense only if the service package is being delivered to the ministry of

foreign affairs at that time. This is the case, because the date on the signed receipt triggers the sixty-day response period under §1608(d). If §1608(a)(3) contemplated, or permitted, sending the service package to an embassy or other intermediary for forwarding to the minister of foreign affairs, §1608 likely would have provided that service "shall be deemed to have been made" at the time of delivery to the minister (or perhaps that some extra time would be added to the sixty-day response period to account for the time needed for forwarding).

Notably, §1608(a)(4) permits a plaintiff to accomplish service through a mailing to the U.S. Department of State for transmittal by diplomatic channels, but, under §1608(c)(1), that service is not deemed to have been made until the service package is transmitted to the foreign state. This scenario confirms both that Congress specified intermediaries when it intended to authorize their use, and that Congress did not intend the sixty-day response time to run until the service package was delivered to the intended recipient.

Further support for the natural reading of §1608(a)(3) is found in §1608(b)(2) and (3). As discussed, §1608(b)(2) permits service upon agencies or instrumentalities of a foreign state by delivery to specified persons ("an officer" or "a managing or general agent") but also to "any other agent authorized by appointment or by law to receive service of process in the United States." And §1608(b)(3) permits service to be delivered by various other methods "if reasonably calculated to give actual notice." The flexibility expressly permitted under

§1608(b)(2) and (3), and the absence of corresponding flexibility under §1608(a)(3), strongly suggests that Congress intended for §1608(a)(3) to be followed meticulously and without derivation. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) (comparing subsections of a statutory section and finding the differences "significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another").

At bottom, if Congress intended to allow a foreign state to be served by a mailing addressed and sent to a diplomatic mission in the United States, Congress could have easily expressed that intention — just as it expressed its intention to permit service through the State Department under §1608(a)(4), upon "agents" under §1608(b)(2), or by various alternative methods under §1608(b)(3). *See also* 28 U.S.C. §1605(b)(1) (providing for delivery of a summons and complaint "to the person, *or his agent*, having possession of the vessel or cargo" (emphasis added)). The natural reading of §1608(a)(3) is therefore that the service package must be sent to the address of the minister of foreign affairs in the foreign state; any alternative or indirect method of delivery is not authorized by §1608(a)(3).

The natural reading of §1608(a)(3) has prevailed ever since the enactment of the FSIA, including in "a message to all [U.S.] diplomatic and consular posts, sent May 15, 1979," in which the State Department wrote: "Paragraph (3) [of §1608(a)] provides for service by sending by registered mail, return receipt requested, the summons and complaint from the

court *directly to the ministry of foreign affairs* of the defendant foreign state." *Service of Process upon a Foreign State*, 1979 Dig. U.S. Prac. Int'l L. 894 (1979) (emphasis added) (text of State Department Circular).

The D.C. Circuit, the court of appeals that adjudicates an outsized share of FSIA cases, has long adhered to this natural reading as well. *See Transaero*, 30 F.3d at 153-54 (D.C. Cir. 1994). In *Transaero*, the D.C. Circuit vacated a default judgment as "void and unenforceable," despite the foreign state's actual notice of the action, because service under §1608(a)(3) had been mailed to the "Bolivian Ambassador and Consul General in Washington . . . but never the Ministry of Foreign Affairs or the Secretary of State." *Id.* at 153, 154. Consistent with the natural reading of §1608(a)(3), the *Transaero* court held that §1608(a)(3) "mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure." *Id.* at 154.

The D.C. Circuit reaffirmed this natural reading in a suit against the Embassy of Zambia. *See Barot*, 785 F.3d at 28, 30 (D.C. Cir. 2015) (citing *Transaero*). As a political subdivision of the Republic of Zambia, the Zambian Embassy was subject to service only under §1608(a). *Id.* at 27. The D.C. Circuit, emphasizing that "strict adherence to the terms of 1608(a) is required," stated that one of the plaintiff's prior attempts at service was unsuccessful because it had been attempted "at the Embassy in Washington, D.C., rather than *at the Ministry of Foreign Affairs in Lusaka, Zambia, as the Act required*." *Id.* at 27, 28

(emphasis added) (quoting *Transaero*, 30 F.3d at 154). The appeals court ultimately directed that service be "sent to the head of the ministry of foreign affairs in Lusaka, Zambia." *Id.* at 30 (internal quotation marks omitted).

The Fifth Circuit also has followed the natural reading of §1608(a)(3), holding that service on the Russian Federation and Ministry of Culture under this provision required service on the head of the Russian Ministry of Foreign Affairs, "through the Ministry of Foreign Affairs," and not through any intermediary. *Magness*, 247 F.3d at 613 (5th Cir. 2001). The Fifth Circuit categorically rejected plaintiffs' attempt to serve the Russian Federation and its political subdivision by papers transmitted by the Texas Secretary of State to Russia "c/o" (i.e. care of) Boris Yeltsin and to the Ministry of Culture "c/o" the Deputy Minister of Culture. *Id.* at 611.

The Fourth Circuit in *Kumar* recognized that the language "addressed and dispatched . . . to" in §1608(a)(3) "reinforce[s] that the location of service must be related to the intended recipient." 888 F.3d at 155. But the Fourth Circuit concluded that the text of §1608(a)(3) alone was insufficient to determine whether service on or through an embassy was compliant:

> The statute is simply ambiguous as to whether delivery at the foreign state's embassy meets subsection (a)(3) given that while the head of the ministry of foreign affairs generally oversees a foreign state's embassies, the foreign minister is rarely — if ever — present

> there. Serving the foreign minister at a location removed from where he or she actually works is at least in tension with Congress' objective, even if it is not strictly prohibited by the statutory language.

Id. While the Fourth Circuit's finding of ambiguity in §1608(a)(3) caused it to go beyond the statutory text and employ other tools for divining Congressional intent, the Fourth Circuit comfortably concluded that service "through," "via," or "care of" a diplomatic mission is prohibited under §1608(a)(3). *Id.* at 158.

The Second Circuit is the only court of appeals to diverge from these conclusions that process may not be served on a foreign state through its mission or other agent. The Second Circuit acknowledged that §1608(a)(3) requires process to be mailed to the head of the ministry of foreign affairs, but understood the provision to be "silent as to a specific location where the mailing is to be addressed." JA178. As this Court observed in interpreting the FSIA in *Samantar*, however, drawing inferences from silence is unwarranted when Congress expressly addressed the issue elsewhere in the FSIA. 560 U.S. at 317 ("Drawing meaning from silence is particularly inappropriate . . . [when] Congress has shown that it knows how to [address an issue] in express terms." (alterations and omission in original) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

Furthermore, the Second Circuit did not seem to consider that §1608(a)(3)'s requirement of a mailing "addressed and dispatched . . . to" the minister of foreign affairs is naturally read as requiring that the

mailing must be addressed and sent to the minister's official address in the foreign state. Nor did the Second Circuit seem to consider the other provisions of the FSIA supporting just such a reading.

The Second Circuit instead contrasted §1608(a)(3) with §1608(a)(4), which specifies that process be mailed "to the Secretary of State *in Washington, District of Columbia*." JA178 (emphasis in original); 28 U.S.C. §1608(a)(4). But that contrast is hardly informative, as the FSIA applies in state courts as well, and §1608(a)(4) appropriately specifies that service through diplomatic channels is always by the federal Secretary of State rather than a Secretary of State of an individual state. *See* 28 U.S.C. §1602 (stating that claims against foreign states are to "be decided by courts of the United States and of the States in conformity with" the FSIA).

Besides, under the Second Circuit's reasoning, §1608(a)(4)'s specification that the mailing should be to the Secretary of State "in Washington, District of Columbia" would leave open the possibility that the mailing could name the Secretary of State but be addressed and sent to an address in Washington other than the Department of State. But the natural reading of §1608(a)(4) is that the mailing must be addressed and sent to the Secretary of State at the State Department, just as the natural reading of §1608(a)(3) is that the mailing must be addressed and sent to the minister of foreign affairs at the ministry in the capital of the foreign state. If anything, the reference to Washington, D.C., in §1608(a)(4) only confirms that a §1608(a)(3) mailing, too, must be sent to the relevant capital city.

In denying rehearing, the Second Circuit acknowledged the amicus brief of the United States and the argument therein that §1608(a)(3) is most naturally read as requiring the mailing to be sent to the head of the ministry "at his or her regular place of work — *i.e.*, at the ministry of foreign affairs in the state's seat of government." JA215 (quoting U.S. amicus brief in support of rehearing at 2 (JA199)). The Second Circuit rejected this argument as "unpersuasive" on the grounds that it would require additional words being read into the statute. JA215. But, the Second Circuit's own interpretation read into the statute the use of intermediaries for service of process on a foreign state and, again, failed to consider the text of §1608(a)(3) — "addressed and dispatched . . . to" — and other relevant statutory provisions. The Second Circuit's interpretation also is inconsistent with the strict construction of §1608(a), under which means of service that are not expressly authorized are prohibited.

The Second Circuit, in denying rehearing, took the opportunity to clarify that it was not holding that the Sudanese Embassy was an agent or proxy for service upon the foreign state: "There is a significant difference between *serving process* on an embassy, and mailing papers to a country's foreign ministry *via* the embassy." JA216 (emphasis in original). The Second Circuit added: "[T]he papers were not served on the embassy as a proxy or agent for Sudan, but they were instead mailed to the Minster of Foreign Affairs, in the most natural way possible — addressed to him, by name, via Sudan's embassy." JA217.

While the Second Circuit disclaimed that process was being served "on" the Sudanese Embassy, the record suggests that the Plaintiffs and the D.C. District Court Clerk thought otherwise. Plaintiffs moved for entry of default immediately upon the expiration of the sixty-day deadline for Sudan to respond to the complaint, counting from the date of the supposed delivery to the Embassy. JA76. The Clerk promptly entered Sudan's default the next day. JA80.

In holding that "service on the foreign minister via the embassy was not inconsistent with the wording of the statute" (JA217), the Second Circuit seemed to appreciate that its reasoning could not be followed to its logical conclusion: "We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as, *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office." JA214 n.3. The statutory language, however, does not support using the embassy — but no other foreign-state office — as an intermediary.

In *Samantar*, this Court observed that the text of the FSIA "does not expressly foreclose" applicability of the statute to foreign officials, but that the FSIA considered as a whole — with its extensive treatment of foreign states, political subdivisions, agencies and instrumentalities but silence on foreign officials — established that the statute did not apply to foreign officials. 560 U.S. at 314-19. The same logic applies here. While §1608(a)(3) may not *expressly* foreclose service of process "through," "via," or "care of" a

diplomatic mission, the FSIA's service provisions considered as a whole — with their extensive treatment of detailed and specific service requirements, but silence on agents or intermediaries for service of process under §1608(a)(3) — decisively foreclose such service. *See also Kumar*, 888 F.3d at 159, n.11 (finding the Second Circuit's distinction between service "on" and service "via" an embassy an "artificial, non-textual distinction" that is "weak and unconvincing").

II. Permitting §1608(a)(3) Service "Through," "Via," Or "Care Of" A Diplomatic Mission Conflicts With The Vienna Convention, In Violation Of U.S. Law

The Second Circuit's reading of §1608(a)(3) is also unsupportable, because it directly conflicts with U.S. treaty obligations under the Vienna Convention, which is an independent and integral part of U.S. law.

The United States was a party to the Vienna Convention on Diplomatic Relations at the time of the enactment of the FSIA in 1976 and remains a party to this day. *See* 23 U.S.T. 2337; *Status of Vienna Convention on Diplomatic Relations*, U.N. Treaty Collection, https://perma.cc/XZ76-XDC5 (last updated Aug. 14, 2018). The Vienna Convention entered into force in the United States on December 13, 1972 (23 U.S.T. 3227), and forms part of U.S. law. U.S. Const., art. VI, cl. 2; *Tabion v. Mufti*, 73 F.3d 535, 536 n.1 (4th Cir. 1996) ("The Vienna Convention became applicable to the United States by the Diplomatic Relations Act, 22 U.S.C. §§251-59 . . . ."); *see also* Diplomatic Relations Act of 1978, Pub. L. No. 95-393,

92 Stat. 808 ("[e]stablish[ing] . . . the Vienna Convention as the United States Law on Diplomatic Privileges and Immunities" and extending "the privileges and immunities specified in the Vienna Convention" to "[m]embers of the mission of a sending state which has not ratified the Vienna Convention"); H.R. Rep. No. 95-526, at 2 (1977) ("Since the [Vienna] Convention is self-executing, no implementing legislation is needed."); 124 Cong. Rec. 26,718 (1978) (statement of Sen. Sarbanes) ("[The Diplomatic Relations Act] would codify the privileges and immunities provisions of the Vienna [C]onvention as the sole U.S. law on the subject."); Restatement (Fourth) on the Foreign Relations Law of the United States, §301 Reporters' note 6 (Am. Law Inst., Tentative Draft No. 2, 2016) (stating that the Vienna Convention on Diplomatic Relations is "self-executing, but Congress has additionally implemented [it] by statute").

As this Court has explained: "A treaty . . . by the express words of the Constitution, is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights." *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909); *see also Air France v. Saks*, 470 U.S. 392, 406 (1985) (applying the Convention for the Unification of Certain Rules Relating to International Transportation by Air and stating "[i]t remains '[our] duty . . . to enforce the . . . treaties of the United States, whatever they might be, and . . . [the] Convention remains the supreme law of the land'" (first three alterations in original) (quoting *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977))).

Therefore, separate and apart from the strict requirements of §1608(a)(3), the Second Circuit was required to reject a method of service of process that violated the terms of the Vienna Convention. *See Tabion*, 73 F.3d at 539 (affirming decision to quash service of process that violated diplomatic immunity provisions of the Vienna Convention); *767 Third Ave. Assocs. v. Perm. Mission of the Republic of Zaire to the U.N.*, 988 F.2d 295, 302 (2d Cir. 1993) (reversing eviction order because it violated Article 22 of the Vienna Convention); *see also* 71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974, which advised foreign missions that "countries party to the Convention on Diplomatic Relations, signed at Vienna on April 18, 1961, would have a basis for objection to the propriety of process served" "through registered or certified mail to the ambassador or chief of mission" "under Article 22, section 1, of that Convention, as interpreted in light of the negotiating history of that Convention").

Moreover, basic principles of statutory interpretation call for consistency with relevant international law and agreements. *See Frost v. Wenie*, 157 U.S. 46, 60 (1895) (holding that "the intention of Congress can be ascertained only by a consideration of" a treaty and its related legislation "in pari materia" because "had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, . . . it would have expressed that intention in plain words and not left it to implication"); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56, 61 (D.C. Cir. 2011) ("Legislation abrogating international agreements must be clear to ensure that Congress — and the

President — have considered the consequences." (internal quotation marks and citation omitted)); Restatement (Third) of the Foreign Relations Law of the United States §114 (Am. Law Inst. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States."). Indeed, because one of the purposes of the FSIA was the "'codification of international law at the time of the FSIA's enactment,'" this Court has "examined the relevant common law and international practice when interpreting the Act." *Samantar*, 560 U.S. at 319-20 (quoting *Perm. Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007)); *see also Kumar*, 880 F.3d at 155 (finding that "the plain language of subsection (a)(3) does not fully resolve the issue before us" and thus analyzing §1608(a)(3) in light of U.S. treaty obligations as well as the FSIA's legislative history).

Furthermore, the text of the FSIA makes clear that the provisions of the Act should be read subject to existing international agreements: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. §1604; *see also* H.R. Rep. No. 94-1487, at 17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625 ("In the event an international agreement expressly conflicts with this bill, the international agreement would control."). Thus, by the express terms of the FSIA, §1608(a)(3)

should be read subject to the immunity provisions of the Vienna Convention.

The Second Circuit's decision permitting §1608(a)(3) service of process "via" Sudan's Embassy in Washington, D.C., is irreconcilable with the Vienna Convention and for this independent reason should be reversed.

1.a. Article 22 of the Vienna Convention provides that "[t]he premises of the mission shall be inviolable." As an international law scholar has observed: "The principle of inviolability of diplomatic missions and their personnel is one of the oldest and universally accepted concepts in the relations between nations." Biswanath Sen, *A Diplomat's Handbook of International Law & Practice* 119 (3d ed. 1988). Indeed, the concept of inviolability dates to at least the Roman times: "whenever the priests of College of Fetiales conducted diplomatic negotiations, the Republic demanded and obtained respect for their inviolability; it also refrained, as a general rule, from any interference with the person or property of foreign ambassadors sent on special mission to Rome." U.N. International Law Commission Secretariat, Diplomatic Intercourse and Immunities, Memorandum Prepared by the Secretariat, ¶ 18, U.N. Doc. A/CN.4/98 (Feb. 21, 1956), *reprinted in* [1956] 2 Y.B. Int'l L. Comm'n 129, U.N. Doc. A/CN.4/SER.A/1956/Add.1 [hereinafter U.N. Secretariat Mem.]. And respect for the inviolability of mission premises "had become by the 18th century an established international practice." *767 Third Ave.*, 988 F.2d at 300.

The international consensus on the importance of inviolability

> stems from the fact that it is both necessary and in the common interest of the whole family of nations that Governments should maintain relations with each other through agents specially empowered for that purpose. These agents should, in the interests of their mission, enjoy full and unrestricted independence in the performance of their allotted duties. It follows, therefore, that their person, domicile, correspondence and subordinate staff should be inviolable.

U.N. Secretariat Mem. ¶ 313.

In 1954, the U.N. International Law Commission decided to "initiate work" on codifying the international legal consensus on "[d]iplomatic intercourse and immunities." U.N. Secretariat Mem. ¶ 1 (internal citation omitted). What would ultimately become the Vienna Convention — including its codification of the concept of mission inviolability and whether to provide for any exceptions — was intensely debated. *See, e.g.*, U.N. Conf. on Diplomatic Intercourse & Immunities, Summary Records of Plenary Meetings & Meetings of the Committee of the Whole, at 135-36, 138-39, U.N. Doc. A.CONF.20/14 (Vol. 1), U.N. Sales No. 61.X.2 (1962) (discussing exception to inviolability in cases of emergency) [hereinafter U.N. Conf. Summary Records]. Ultimately, the consensus was that there should be ***no*** exception to mission inviolability and

that "the receiving State is obliged to prevent its agents from entering the premises for *any official act whatsoever*." *767 Third Ave.*, 988 F.2d at 299 (emphasis added) (quoting *Report of the International Law Commission to the General Assembly*, 12 U.N. GAOR Supp. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, at 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1); *see also* U.N. Conf. Summary Records 136 ("[T]he inviolability of the mission premises was one of the most important principles of international law. . . . The International Law Commission had therefore been right in not providing for any exceptions, which would be contrary to international law, open the door to abuses and be fraught with serious consequences." (description of statements of Mr. Ivan Daskalov (Bulgaria))).

1.b. Both U.S. and international law recognize that, among the "official acts" prohibited by the inviolability principle, Article 22 prohibits service of process on a sovereign's embassy, consulate, and diplomatic officers, including service by mail. *See, e.g., Autotech Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (holding that "service through an embassy is expressly banned" by the Vienna Convention); *767 Third Ave.*, 988 F.2d at 301 (approvingly acknowledging view that "process servers may not even serve papers without entering at the door of a mission because that would 'constitute an infringement of the respect due to the mission'" (internal citation omitted)); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission

premises is prohibited seems to have become generally accepted in practice."); James Crawford, *Brownlie's Principles of Public International Law* 403 (8th ed. 2012) ("It follows from Article 22 that writs cannot be served, even by post, within the premises of a mission *but only through the local Ministry for Foreign Affairs*." (emphasis added)); Ludwik Dembinski, *The Modern Law of Diplomacy* 193 (1988) ("[Article 22] protects the mission from receiving by messenger or by mail any notification from the judicial or other authorities of the receiving State.").

As the United States has stated in this case: "The Executive Branch's interpretation also reflects the prevailing understanding of Article 22" that "service by post on mission premises is prohibited." Br. of the United States as Amicus Curiae, May 22, 2018 [hereinafter U.S. Br.], at 12-13 (quoting Denza, *supra*, at 124). The United States further explained that its view accords with the Convention's drafting history and the views of other countries that are party to the treaty. U.S. Br. 13; *see Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1509 (2017) (looking to treaty drafting and negotiating history to confirm understanding of treaty term). Indeed, in a report accompanying a preliminary draft of the Vienna Convention, the U.N. International Law Commission stated:

> [N]o writ shall be served within the premises of the mission, nor shall any summons to appear before a court be served in the premises by a process server. Even if process servers do not enter the premises but carry out their

> duty at the door, such an act would constitute an infringement of the respect due to the mission. All judicial notices of this nature must be delivered *through the Ministry for Foreign Affairs of the receiving State.*

Report of the International Law Commission to the General Assembly, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), *reprinted in* [1957] 2 Y.B. Int'l L. Comm'n 131, at 137 U.N. Doc. A/CN.4/SER.A/1957/Add.1 (emphasis added). The negotiating history of the Vienna Convention also demonstrates "that it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, *even by post*, within the premises of a diplomatic mission." U.N. Conf. Summary Records at 141 (emphasis added) (description of statements of Mr. Michitoshi Takahashi (Japan)); *see also id.* at 137 (representative for Argentina stating that "his delegation was opposed to any exceptions to the principle of the inviolability of mission premises" and stating that his delegation would vote against a proposed amendment "if it were to be interpreted as permitting the service of a writ through the post" (description of statements of Mr. Carlos Maria Bollini Shaw (Argentina))).

Remarkably, in its opinion denying Sudan's petition for rehearing, the Second Circuit panel expressly acknowledged that service upon a foreign embassy or mission is prohibited by the Vienna Convention: "We acknowledge that these provisions preclude service of process on an embassy or diplomat

as an agent of a foreign government, as there would be a breach of diplomatic immunity if an envoy were subjected to compulsory process. Accordingly, service on an embassy or consular official would be improper." JA222 (citing Vienna Convention, arts. 22, 31). Plaintiffs themselves have also repeatedly conceded that §1608(a)(3) does not permit service on any embassy as the method is barred by the Vienna Convention. *See, e.g.*, Opp'n to Pet. for Writ. of Cert. 17, 19. Thus, it is undisputed that §1608(a)(3) precludes service upon a foreign state's embassy.

2. By nevertheless permitting §1608(a)(3) service "on [Sudan's] foreign minister *via* the embassy address" (JA182 (emphasis in original)), the Second Circuit endorsed a method for service of process on a foreign state that directly contravenes the principle of inviolability under the Vienna Convention and fails to give effect to the intention of the treaty parties. *Cf. Water Splash*, 137 S. Ct. at 1512 (recognizing the "importance of read[ing] the treaty in a manner consistent with the *shared* expectations of the contracting parties" (alteration and emphasis in original) (internal quotation marks and citation omitted)).

Relying on an artificial semantic distinction between service "on" and "via" an embassy, the Second Circuit understood there to be a difference between Plaintiffs' attempted service and the service prohibited by the Vienna Convention: "In a case where the suit is not against the embassy or diplomatic agent, but against the foreign state with service on the foreign minister *via* the embassy address, we do not see how principles of mission

inviolability and diplomatic immunity are implicated." JA182 (emphasis in original). Even after both Sudan and the United States emphasized that service "on" and "via" an embassy are one and the same and equally violate mission inviolability, the Second Circuit adhered to its purported distinction, stating:

> [S]ervice on an embassy or consular official would be improper. But that is not what happened here. Rather, process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador. The papers were specifically addressed to the Minister of Foreign Affairs via the embassy, and the embassy sent back a return receipt acknowledging receipt of the papers.

JA222. The Second Circuit cited no authority or support for its purported distinction, other than two cases from the U.S. District Court for the Eastern District of Virginia, which have since been overruled by the Fourth Circuit. JA218-219; *see Kumar*, 880 F.3d at 158 (declining to authorize service under §1608(a)(3) that names the foreign minister but is mailed to the foreign state's embassy). The Second Circuit instead based its reasoning on the fundamentally flawed premise that the Vienna Convention simply does not address the concept of service "via" an embassy. JA181-182.

As the United States has emphasized in its brief to this Court, the Second Circuit's distinction is "artificial" and "non-textual," as "in either case,

mailing service to the embassy treats [the embassy] as the state's 'de facto agent for service of process,' in violation of the [Vienna Convention]'s principle of mission inviolability." U.S. Br. 15 (quoting *Kumar*, 880 F.3d at 159 n.11). The views of the United States on this question of treaty interpretation are "entitled to great weight." *Abbott v. Abbott*, 560 U.S. 1, 15 (2010); *see also Water Splash*, 137 S. Ct. at 1512 (holding same). Likewise, the Fourth Circuit in *Kumar* held:

> The distinction . . . accepted by the Second Circuit in *Harrison*, rests on the artificial, non-textual distinction between service "on" the embassy and "via" the embassy. . . . [W]e find no such distinction for purposes of subsection (a)(3). In both cases, the embassy is the de facto agent for service of process, something the Vienna Convention does not allow absent a waiver of mission inviolability.

Kumar, 880 F.3d at 159 n.11.

In short, the Second Circuit's distinction without a difference is nothing but a "semantic ploy" to permit what is otherwise plainly prohibited by the Vienna Convention. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993) (reasoning that "[t]o give jurisdictional significance to" a "semantic ploy . . . would effectively thwart the [FSIA]'s manifest purpose to codify" international law).

2.a. The Second Circuit found it "difficult to understand how mailing a letter to the Foreign

Minister of a country in care of that country's embassy in Washington . . . can be considered a grave insult to the 'independence and sovereignty' of the embassy's premises." JA224. But, notwithstanding the Second Circuit's dismissiveness, serving process by mail is not merely "mailing a letter," and Congress would not have carefully crafted the strict hierarchical procedures for service of process on a foreign sovereign under §1608(a) if it were. Rather, "[s]ervice of process refers to a formal delivery of documents that is legally sufficient to charge the defendant with notice of a pending action." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). As has been long recognized in international practice under the Vienna Convention (*see supra*), sending process into a mission may indeed be considered an infringement of sovereignty. *E.g.*, *767 Third Ave.*, 988 F.2d at 301 (recognizing that serving papers without entering the mission may "constitute an infringement of the respect due to the mission" (citation omitted)).

Like each of the methods prescribed in §1608(a), service of process under §1608(a)(3) requires, among other things, transmission of the "summons" and "complaint." The complaint informs the defendant about the subject of the suit. *See* Fed. R. Civ. P. 8(a); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (recognizing that a complaint is designed "to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests") (alteration in original). The summons, which is issued and signed by an officer of the court and bears the seal of the court, "state[s] the time within which the defendant *must* appear and defend" and "notif[ies] the defendant that

a failure to appear and defend *will result in a default judgment* against the defendant for the relief demanded in the complaint." Fed. R. Civ. P. 4(a)-(b) (emphases added).

As this Court has described: "Service of summons is the procedure by which a *court . . . asserts jurisdiction* over the person of the party served." *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 350 (1999) (emphasis added) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946)). This Court elaborated:

> [O]ne becomes a party officially, and is *required* to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend. Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non directing* an individual or entity to participate in a civil action or forgo procedural or substantive rights.

Id. (emphases added) (internal citations omitted).

The official and coercive nature of a summons distinguishes its delivery from merely "mailing a letter" and constitutes a clear violation of mission inviolability under the Vienna Convention. *See* U.S. Br. 11 ("Mission inviolability means, among other things, that 'the receiving State * * * is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises.'" (quoting Denza, *supra*, at 110)).

The Second Circuit also attempted to minimize the offense of permitting service "via" the embassy, stating that the foreign state's mission has "*less* sovereignty than the actual territory of the sending state." JA224 (emphasis in original); *see also* JA225 ("While the precise degree to which the sovereignty of the embassy is less than a state's control over its own territory is subject to debate, it is evident that an embassy is not *more* sovereign than the territory of the sending state itself." (emphasis in original)). But, the Second Circuit ignores that, under the Vienna Convention, the treaty parties have agreed that service of process sent into their diplomatic missions offends their sovereignty, and there is no similar international agreement to prohibit the delivery of service into the foreign state itself.

2.b. The Second Circuit's rule further violates the principle of mission inviolability by allowing private plaintiffs, through the clerk of the court, to dictate internal diplomatic procedures of the foreign state. To be effective, service of process on a foreign state "via" its embassy necessarily requires the foreign state's embassy to forward the service package to the head of the foreign ministry at the seat of government. Indeed, the Second Circuit found that the embassy's transfer of the service of process by diplomatic pouch to the foreign minister would be more reliable than a "direct mailing" that relied on "the capacity of the foreign postal service or a commercial carrier . . . ." JA182. In effect, the foreign state's embassy would act as an agent for service of process of either the clerk of the U.S. court or the plaintiffs in effecting the service of process.

This method of service violates not only mission inviolability but also the inviolability of the mission's official correspondence and diplomatic pouch. *See* Vienna Convention, art. 27(2) ("The official correspondence of the mission shall be inviolable."); *Report of the International Law Commission to the General Assembly*, 13 U.N. GAOR Supp. No. 9, at 19, U.N. Doc. A/3859 (1958), *reprinted in* [1958] 2 Y.B. Int'l L. Comm'n 78, U.N. Doc. A/CN.4/SER.A/1958/Add/1 (emphasizing "the overriding importance . . . of the principle of the inviolability of the diplomatic bag"). Like the United States, several other parties to the Vienna Convention agree. Br. of the Kingdom of Saudi Arabia as *Amicus Curiae* in Supp. of the Pet. for Cert., Apr. 10, 2017, at 10-11 ("The notion that an American court can dictate that contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law."); United Arab Emirates *Amicus Curiae* Br. in Supp. of Pet'r, Apr. 10, 2017, at 7 (stating that "the panel's analysis assumes it is permissible and appropriate for Congress to commandeer an embassy's internal and protected processes for communicating with its home country . . . [It] offends all of the[] protections [afforded by Articles 22, 27, 29, 31, and 34 of the Vienna Convention, and] . . . mandates the ambassador to play the role of receiving agent for the foreign minister"); Note Verbale from the Austrian Embassy to the United States, Apr. 11, 2017, at ¶ 6 (enclosed with Suppl. Br. for Pet'r, Apr. 13, 2017) ("Article 22 of the [Vienna Convention] establishes that neither judicial nor administrative acts of public authority by the receiving state are to be exercised on the

premises of the diplomatic mission. This includes service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign state."); Br. of *Amicus Curiae* Gov't of Nat'l Accord, State of Libya in Supp. of Pet'r, Apr. 10, 2017, at 4 (stating that "developing and transitional nations cannot afford the substantial risks of leaving service of process — and, by extension, the specter of default judgment — in the hands of often-transitory embassy staff who lack any delegated authority over legal matters from their home government. And, pursuant to the diplomatic inviolability guaranteed by treaty under Article 22 of the [Vienna Convention], they should not have to"). Where the parties to a treaty agree on its interpretation, U.S. courts must "defer to that interpretation . . . absent extraordinarily strong contrary evidence." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185 (1982). The views of these member states must be afforded "considerable weight." *Water Splash*, 137 S. Ct. at 1512; *Abbott*, 560 U.S. at 16.

3. The Second Circuit also attempted to square its holding with the Vienna Convention by suggesting that Sudan had in any event consented to receive service at its embassy by failing to reject the package of service documents. JA223. Observing that the Vienna Convention "provides that a mission may 'consent' to entry onto its premises," the Second Circuit asserted that "[n]othing about our decision affects the ability of any state to refuse to accept service via its embassies." *Id.* The Second Circuit is incorrect that the failure of Sudan's Embassy to reject or return the service package excuses Plaintiffs'

improper service or the court's violation of the Vienna Convention.

First, neither Sudan, nor its Embassy, had any duty to reject improper service. *See, e.g., Magness*, 247 F.3d at 615-16 (holding that proper service on a state requires "strict compliance" with the terms of §1608); *Transaero*, 30 F.3d at 154 (same). And indeed, it remains questionable whether the Embassy in fact even had that option as a practical matter, as the only record evidence shows that the package was delivered to Charlotte Hall, Maryland, not the embassy's address in Washington, D.C. JA75.

Second, as the Second Circuit seemed to recognize (JA223), Article 22 of the Vienna Convention makes clear that the "agents of the receiving State may not enter" the premises of the mission "except with the consent of the *head of the mission*" (emphasis added). The head of the mission is the ambassador or chargé d'affaires, not a mail clerk or security guard who might sign for the package. *See* Vienna Convention, art. 1(a)-(b) ("The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity; The 'members of the mission' are the head of the mission and the members of the staff of the mission."). As the Fourth Circuit held: "Simple acceptance of the certified mailing from the clerk of court [by an embassy employee] does not demonstrate a waiver" of the Vienna Convention. *Kumar*, 880 F.3d at 157 n.9; *see also* U.S. Br. 15 (noting same). And, as the United States observed in its brief: "[N]o record evidence suggests that [Sudan's] Ambassador to the United States — the head of the mission —

was aware of, much less consented to receive, respondents' service of process." U.S. Br. 15-16.

Accordingly, there is simply no basis to sustain the Second Circuit's artificial distinction between service "on" an embassy and service "via" an embassy that could reconcile the court's opinion with the established principles of sovereignty and mission inviolability embodied in the Vienna Convention.

III. The FSIA's Legislative History Confirms That Congress Intended For §1608(a)(3) To Comport With The Vienna Convention And To Preclude Mailing Process To A Diplomatic Mission

In interpreting the FSIA, this Court has endorsed looking to legislative history to confirm the Court's reading of the statutory text. *See Samantar*, 560 U.S. at 316 n.9 ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it." (internal quotation marks omitted)). While resort to legislative (or statutory) history is not necessary for reversal here, that history confirms that Congress intended §1608(a)(3) to be interpreted consistent with U.S. treaty obligations under the Vienna Convention. *See Kumar*, 880 F.3d at 156 ("The House Judiciary Committee Report regarding the enactment of §1608(a) shows that the statute is meant to account for the United States' rights and obligations under the Vienna Convention." (citing H.R. Rep. No. 94-1487)). As the Seventh Circuit has explained, the FSIA's legislative history unequivocally indicates that service by mail upon an embassy is "precluded" under §1608(a)(3) "so as to avoid questions of inconsistency with section 1 of

Article 22 of the Vienna Convention on Diplomatic Relations." *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (quoting H.R. Rep. No. 94-1487, at 26, and holding that §1608(a)(3) service was improper because it had not been mailed to the head of Nicaragua's ministry of foreign affairs, but rather to the Nicaraguan Ambassador in Washington); *see also Autotech*, 499 F.3d at 748-49 (relying on FSIA's legislative history to hold service "through an embassy" is "precluded").

Contrary to the Second Circuit's suggestion that the legislative history is "sparse" and "sheds little light on the question" (JA181), in fact the legislative history of §1608 is extensive and establishes that service by mail via a foreign state's diplomatic mission was purposefully *excluded* from the version of §1608 that ultimately was enacted. The Second Circuit failed to seriously consider this history.

As the legislative history recounts, prior to the FSIA's enactment, there was "great uncertainty about the proper mode of service of process on foreign states." 119 Cong. Rec. 2218 (1973) (Proceedings & Debates of the 93d Congress); *see also id.* at 2216 (section-by-section analysis). Under one service method used before the FSIA's enactment, jurisdiction over a foreign state could be obtained by attaching the property of a foreign state. *Id.* at 2218. But this method of obtaining jurisdiction over a foreign state suffered from "a fatal logical flaw," because, among other reasons, the property attached could not be used to satisfy a judgment against the foreign state, even where the foreign state lacked immunity from suit. *Id.* (observing that that this

"made it seem nothing more than a technical procedural device with no basis in substance"). The provision for service of process in §1608 was "designed to replace the stopgaps and artificial devices that have been employed in the past." *Id.*

In 1973, the State and Justice Department "submitted jointly" the first version of the proposed bill that ultimately became the FSIA. *Id.* at 2215; *see also Helmerich*, 137 S. Ct. at 1320-21 (confirming the State Department's role in drafting the FSIA and quoting Hearing on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the House of Representatives Committee on the Judiciary, 93d Cong., 1st Sess., 18 (1973)); *see also Samantar*, 560 U.S. at 323 n.19 ("The FSIA was introduced in accordance with the recommendation of the State Department." (citing H.R. Rep. No. 94-1487, at 6)). That version allowed for service against a foreign state by "registered or certified mail . . . to the ambassador or chief of mission of the foreign state," but only in conjunction with service through diplomatic channels via the State Department. *E.g.*, S. 566, 93d Cong. §1608 (1973); 119 Cong. Rec. 2214. This dual-tracked service was designed to ensure that "the foreign state [was] notified even if through some error — such as the receipt of the mailed copy of a summons and complaint by a minor official who fail[ed] to bring it to the attention of the ambassador — the foreign state itself [did] not receive actual notice through the mail." 119 Cong. Rec. 2218. Unlike the Second Circuit's conclusion (JA182-183), this legislative history expresses the view that a mailing through a foreign state's embassy or mission alone would be unreliable.

The text of the bill, however, was later revised specifically due to concerns that a mailing to an embassy would violate Article 22 of the Vienna Convention. In July 1974, the State Department sent a diplomatic note to the heads of foreign missions in Washington, D.C., informing them about the draft bill and stating:

> Section 1608 of the proposed bill would provide for service of process in suits instituted against a foreign government through delivery of a copy of the summons by registered or certified mail to the ambassador or chief of mission of the foreign government concerned. The Department believes that such service may be beneficial to foreign governments in that it would provide an alternative to the disruptive practice of attachment of assets, such as bank accounts, of a foreign government for the purposes of jurisdiction. Nevertheless, it has come to the Department's attention that countries party to the Convention on Diplomatic Relations, signed at Vienna on April 18, 1961, would have a basis for objection to the propriety of process served in this manner [as proposed under the bill] under Article 22, section 1, of that Convention, as interpreted in light of the negotiating history of that Convention.

71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974). The note further

stated that the Department of State was "considering an appropriate revision of the proposed bill dealing with service of process," and that "the Vienna Convention . . . , which has been ratified by the United States, forms part of the law of the United States; and any method of service inconsistent with the provisions of that Convention, as illuminated by the negotiating history, may be subject to challenge in the courts." *Id.*

Subsequently, in 1975 and 1976, the State and Justice Departments submitted revised companion bills to the House of Representatives (H.R. 11315, 94th Cong. (1975)) and the Senate (S. 3553, 94th Cong. (1976)). The bills included a "substantial revision of Section 1608 relating to service of process to conform with Article XXII of the Convention on Diplomatic Relations . . . ." 122 Cong. Rec. 17,465 (1976); H.R. Rep. No. 94-1487, at 45. Both bills removed completely service by mail on the foreign state addressed "to the ambassador or chief of mission" and instead required that the mailing be addressed "to the official in charge of the foreign affairs of the foreign state." 122 Cong. Rec. 17,464; H.R. Rep. No. 94-1487, at 45. A section-by-section analysis of S. 3553 confirms that the revised bill was prompted by "several foreign governments" that had "brought to the attention of the department of State that the drafters of the Vienna Convention had construed Article 22 as prohibiting the service of process or writ, 'even by post, within the premises of a diplomatic mission.'" 122 Cong. Rec. 17,469.

Further amendments to H.R. 11315 (which ultimately became the FSIA) revised §1608(a) to

require that mailed service be addressed "to the head of the ministry of foreign affairs of the foreign state concerned." 122 Cong. Rec. 33,536. The House Report on H.R. 11315 reiterated that the new §1608(a) precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487, at 26.

The Second Circuit considered the House Report but quickly dismissed it on the basis that the report "fails to make the distinction at issue in the instant case, between 'service *on* an embassy by mail,' and service on a minister of foreign affairs *via* or *in care of* an embassy." JA181 (alterations in original, internal citations omitted). The Second Circuit misread the report: the House Report reflects the Congressional intent to preclude service sent to or delivered to an embassy, *categorically*. H.R. Rep. No. 94-1487, at 26 (section-by-section analysis). And, again, the Second Circuit cited no authority to support its artificial distinction, beyond two cases of the Eastern District of Virginia that have since been overruled by the Fourth Circuit in *Kumar*. *See* JA179-180, JA182-183; *Kumar*, 880 F.3d at 159 (recognizing that its decision is in direct conflict with the Second Circuit's decision in *Harrison*).

IV. Foreign-Relations And Reciprocity Interests Of The United States Would Be Undermined If Mailing Process To A Diplomatic Mission Were Permitted Under §1608(a)(3)

The United States has already informed this Court that it agrees with Sudan that the text of

§1608(a)(3), the Vienna Convention, and the FSIA's legislative history foreclose service by mail to Sudan's Embassy. U.S. Br. 7 (stating that the Second Circuit's decision "contravenes the most natural reading of the statutory text, treaty obligations, and the FSIA's legislative history"). Those views are entitled to "great weight" and "special attention." *See Water Splash*, 137 S. Ct. at 1512 (quoting *Abbott*, 560 U.S. at 15); *Sumitomo*, 457 U.S. at 184 n.10; *Helmerich*, 137 S. Ct. at 1320. Beyond the deference owed to the views of the United States in respect of the FSIA and treaty interpretation, the United States has important interests that are threatened by the Second Circuit's holding.

This Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). And in *Helmerich*, this Court credited the admonition of the Executive Branch against adopting an interpretation of the FSIA that "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to reciprocate." *Helmerich*, 137 S. Ct. at 1322 (alteration in original) (citation omitted). Here, the United States has stressed in its brief to this Court that the Second Circuit's interpretation of §1608(a)(3) — and its disregard for the Vienna Convention — "threatens harm to the United States' foreign relations." U.S. Br. 7. Indeed, this concern is not new: the United States over many years has repeatedly appeared in cases against foreign states to protest service of process delivered to foreign diplomatic missions in

the United States. *See, e.g.*, Pet. for Writ of Cert. 25-26 (citing Amicus Curiae Briefs and Statements of Interest of the United States as).

The United States has also explained here that the Second Circuit's decision creates a risk of reciprocal treatment in foreign courts:

> [T]he United States routinely refuses to recognize the propriety of service through mail or personal delivery by a private party or foreign court to a United States embassy. When a foreign litigant or court officer purports to serve the United States through an embassy, the embassy sends a diplomatic note to the foreign ministry in the forum state, explaining that the United States does not consider itself to have been served consistent with international law and thus will not appear in the litigation or honor any judgment that may be entered against it.

U.S. Br. 14. The United States has emphasized that it "has a strong interest in ensuring that its courts afford foreign states the same treatment to which the United States believes it is entitled under customary international law and the [Vienna Convention]." U.S. Br. 14. These concerns of reciprocal treatment are significant, as "[a]t any given time the Department of Justice's Office of Foreign Litigation represents the United States in about 1,000 cases in 100 courts around the world." *Helmerich*, 137 S. Ct. at 1322 (citing Brief for the United States as *Amicus Curiae*, at 21-22, *Bolivarian Republic of Venez. v. Helmerich*

& Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) (No. 15-423)). As the Fourth Circuit stated in *Kumar*: "Clearly, the United States cannot expect to receive treatment under the Vienna Convention that its own courts do not recognize in similar circumstances involving foreign states. This dilemma is avoided by the construction of subsection (a)(3) urged by the State Department." *Kumar*, 880 F.3d at 158.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit and hold that the 2012 default judgment against Sudan is void and unenforceable.

Respectfully submitted,

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August 15, 2018

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ADDITIONAL PARTIES TO THIS PROCEEDING

The following entities, respondents on review, were defendants below. Pursuant to Rule 12.6 of this Court, Sudan states that it does not believe that these entities have an interest in the outcome of this case: Advanced Chemical Works, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Training and Chemical Works Company Limited; Accounts & Electronics Equipments, AKA Accounts and Electronics Equipments; Agricultural Bank of Sudan; Alaktan Cotton Trading Company, AKA Alaktan Trading Company; Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works, AKA Advanced Trading and Chemical Works Company Limited; Advanced Mining Works Company Limited; Advanced Petroleum Company, AKA APCO; African Oil Corporation; Advanced Engineering Works; Advanced Trading and Chemical Works Company Limited, AKA Advanced Commercial and Chemical Works Company Limited, AKA Advanced Chemical Works; Al Sunut Development Company, AKA Alsunut Development Company; African Drilling Company; Al Pharakim, AKA Alfarachem Company Limited, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alaktan Trading Company, AKA Alaktan Cotton Trading Company; Alfarachem Company Limited, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarakim; Alfarakim, AKA Al Pharakim, AKA Alfarachem Pharmaceuticals Industries Limited, AKA Alfarachem Company

Limited; Alfarachem Pharmaceuticals Industries Limited, AKA Al Pharakim, AKA Alfarakim, AKA Alfarachem Company Limited; Alsunut Development Company, AKA Al Sunut Development Company; APCO, AKA Advanced Petroleum Company; Amin El Gezai Company, AKA El Amin El Gezai Company; Arab Cement Company; Arab Sudanese Blue Nile Agricultural Company; Assalaya Sugar Company Limited; Arab Sudanese Seed Company; Arab Sudanese Vegetable Oil Company; Atbara Cement Company Limited; Automobile Corporation; Babanousa Milk Products Factory; Bank of Khartoum; Bashaier; Blue Nile Brewery; Blue Nile Packing Corporation; Central Electricity and Water Corporation, AKA Public Electricity and Water Corporation; Building Materials and refractories Corporation; Coptrade Company Limited, Pharmaceutical and Chemical Division; Central Bureau of Statistics of the Republic of Sudan; El Amin El Gezai Company, AKA Amin El Gezai Company; Coptrade Eng and Automobile Services Co Ltd., AKA Kordofan Automobile Company; Duty Free Shops Corporation; El Nilein Bank, El Nilein Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Gezira Automobile Company; El Nilein Industrial Development Bank Group, AKA Industrial Bank of Sudan; Engineering Equipment Company; El Nilein Industrial Development Bank (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank Group, AKA Nilein Industrial Development Bank (Sudan); El Nilein Industrial Development Bank Group, AKA El Nilein Bank, AKA Nilein

Industrial Development Bank (Sudan), AKA El Nilein Industrial Development Bank (Sudan); El Taka Automobile Company, AKA Taka Automobile Company; Emirates and Sudan Investments Company Limited; Engineering Equipment Corporation; Exploration and production Authority, (Sudan); Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank, Sudan Commercial Bank; Sudan Commercial Bank; Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; Farmers Bank for Investment & Rural Development; Farmers Commercial Bank, AKA Farmers Bank for Investment and Rural Development, AKA Sudan Commercial Bank, AKA Farmers Bank for Investment & Rural Development; Friendship Spinning Factory; Food Industries Corporation; Forests National Corporation; Gezira Tannery; Gezira Automobile Company, AKA El Gezira Automobile Company; Gezira Scheme, AKA Sudan Gezira Board; Gezira Trade and Services Company Limited, AKA Gezira Trade & Services Company Limited; Gezira Trade & Services Company Limited, AKA Gezira Trade and Services Company Limited; Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, Giad Cars and Heavy Trucks Company, Giad Automotive and Truck, AKA Giad Auto, AKA Giad Automotive; Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company; Giad Automotive Industry

Company Limited, AKA Giad Automotive Company, AKA Giad Cars & Heavy Trucks Company, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Cars & Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars and Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology, AKA Giad Industrial City; Gineid Sugar Factory; Giad Cars and Heavy Trucks Company, AKA Giad Automotive Company, AKA Giad Automotive Industry Company Limited, AKA Giad Cars & Heavy Trucks Company, AKA Giad Automotive and Truck; Giad Motor Industry Company Limited; Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech, AKA Sudan Master Technology; Giad Motor Company, AKA Giad Motor Industry Company Limited; Greater Nile Petroleum Operating Company Limited, AKA GNPOC; GNPOC, AKA Greater Nile Petroleum Operating Company Limited; Grouped Industries Corporation; Haggar Assalaya Sugar Factory; Hi Tech Group, AKA High Tech Group, AKA HighTech Group, AKA HiTech Group; HiConsult, AKA Hi-Consult; Gum Arabic Co. Ltd., AKA Gum Arabic Company, AKA GAC; Hicom, AKA Hi-Com; Guneid Sugar Company Limited, AKA Guneid Sugar Factory; Hi-Consult, AKA HiConsult; High Tech Group, AKA Hi Tech Group, AKA HighTech Group, AKA HiTech Group; HighTech Group, AKA Hi Tech

Group, AKA High Tech Group, AKA HiTech Group; Hi-Tech Chemicals; ICDB, AKA Islamic Co-Operative Development Bank; HiTech Group, AKA Hi Tech Group, AKA High Tech Group, AKA HighTech Group; Hi-Tech Petroleum Group; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Bank Company for Trade & Development Limited, AKA Industrial Bank Company for Trade & Development Limited; Industrial Production Corporation; Ingassana Mines Hills Corporation, AKA Ingessana Hills Mines Corporation; Industrial Bank of Sudan, AKA El Nilein Industrial Development Bank Group; Industrial Research and Consultancy Institute; Juba Duty Free Shop; Ingessana Hills Mines Corporation, AKA Ingassana Mines Hills Corporation; Islamic Co-Operative Development Bank, AKA ICDB; Karima Date Factory; Karima Fruit and Vegetable Canning Factory; Kassala Fruit Processing Company; Kassala Onion Dehydration Factory; Kenaf Socks Factory; Kenana Sugar Company Ltd.; Kenana Friesland Dairy; Kenana Engineering and Technical Services; Kenana Integrated Agricultural Solutions; Khartoum Gum Arabic Processing Company; Khartoum Central Foundry; Khartoum Tannery; Khartoum Commercial and Shipping Company Limited; Khartoum Refinery Company Ltd.; Khor Omer Engineering Company; Krikah Industries Group; Kordofan Automobile Company, AKA Coptrade Eng and Automobile Services Co Ltd.; Kordofan Company; Leather Industries Corporation, AKA Leather Industries Tanneries; Mangala Sugar Factory; Leather Industries Tanneries, AKA Leather Industries

Corporation; Malut Sugar Factory; Military Commercial Corporation; Maspio Cement Corporation; May Engineering Company; Ministry of Agriculture and Irrigation of the Republic of Sudan; Ministry of Animal and Fishery Resources and Pastures of the Republic of Sudan; Ministry of Commerce of the Republic of Sudan; Ministry of Environment, Forests and Physical Development of the Republic of Sudan; Ministry of Culture and Information of the Republic of Sudan; Ministry of Electricity & Water Resources of the Republic of Sudan; Ministry of Energy and Mining of the Republic of Sudan; Ministry of Federal Governance of the Republic of Sudan; Ministry of Finance and National Economy of the Republic of Sudan; Ministry of Foreign Affairs of the Republic of Sudan; Ministry of Foreign Trade of the Republic of Sudan; Ministry of Guidance and Endowments of the Republic of Sudan; Ministry of Health of the Republic of Sudan; Ministry of Higher Education and Scientific Research of the Republic of Sudan; Ministry of Human Resources Development & Labor of the Republic of Sudan; Ministry of Humanitarian Affairs of the Republic of Sudan; Ministry of Information and Communications of the Republic of Sudan; Ministry of Industry of the Republic of Sudan; Ministry of Interior of the Republic of Sudan; Ministry of Investment of the Republic of Sudan; Ministry of Justice of the Republic of Sudan; Ministry of Minerals of the Republic of Sudan; Ministry of Oil of the Republic of Sudan; Ministry of Social Welfare, Woman and Child Affairs of the Republic of Sudan; Ministry of Parliamentary Affairs of the Republic of Sudan; Ministry of Public Education of the Republic

of Sudan; Ministry of Science and Technology of the Republic of Sudan; Ministry of Youth and Sport of the Republic of Sudan; Ministry of Tourism, Antiquities and Wildlife of the Republic of Sudan; Ministry of Transport, Roads and Bridges of the Republic of Sudan; Ministry of Welfare and Social Security of the Republic of Sudan; Modern Electronic Company; Modern Laundry Blue Factory, AKA The Modern Laundry Blue Factory; National Cigarettes Co. Limited; Modern Plastic & Ceramics Industries Company, AKA Modern Plastic and Ceramics Industries Company; Modern Plastic and Ceramics Industries Company, AKA Modern Plastic & Ceramics Industries Company; National Cotton and Trade Company; National Electricity Corporation, AKA Sudan National Electricity Corporation, AKA National Electricity Corporation (Sudan); National Reinsurance Company (Sudan) Limited; New Haifa Sugar Factory; New Khartoum Tannery; New Halfa Sugar Company, AKA New Halfa Sugar Factory Company Limited; Nile Cement Factory; New Halfa Sugar Factory Company Limited, AKA New Halfa Sugar Company; Nile Cement Company Limited; Omdurman Shoe Factory; Nilein Industrial Development Bank, (Sudan), AKA El Nilein Bank, AKA El Nilein Industrial Development Bank, (Sudan), AKA El Nilein Industrial Development Bank Group; Plastic Sacks Factory, AKA Sacks Factory; Northwest Sennar Sugar Factory; Port Sudan Edible Oils Storage Corporation; Oil Corporation; Port Sudan Cotton and Trade Company, AKA Port Sudan Cotton Company; PetroHelp Petroleum Company Limited; Port Sudan Duty Free Shop; Petroleum General Administration; Posts and

Telegraphs Public Corporation, AKA Posts & Telegraphs Corp.; Port Sudan Cotton Company, AKA Port Sudan Cotton and Trade Company; Rabak Oil Mill; Port Sudan Refinery Limited; Public Corporation for Irrigation and Excavation; Port Sudan Spinning Factory; Public Corporation for Building and Construction; Rainbow Factories; Public Corporation for Oil Products and Pipelines; Public Electricity and Water Corporation, Central Electricity and Water Corporation; Rea Sweet Factory; Ram Energy Company Limited; Red Sea Hills Minerals Company; Red Sea Stevedoring; Sacks Factory, AKA Plastic Sacks Factory; Refrigeration and Engineering Import Company; SFZ, AKA Sudanese Free Zones and Markets Company; Roads and Bridges Public Corporation; Sennar Sugar Company Limited; Sheikan Insurance and Reinsurance Company Limited, AKA Sheikan Insurance Company; Sheriek Mica Project, AKA Shereik Mica Mines Company; Sheikan Insurance Company, AKA Sheikan Insurance and Reinsurance Company Limited; Shereik Mica Mines Company, AKA Sheriek Mica Project; SRC, AKA Sudan Railways Corporation; Silos and Storage Corporation; SRDC, AKA Sudan Rural Development Company Limited; Spinning and Weaving Corporation; State Trading Company, AKA State Trading Corporation; Sudan Air, AKA Sudan Airways, AKA Sudan Airways Co. Ltd.; State Corporation for Cinema; Sudan Commercial Bank, FKA Farmers Bank for Investment & Rural Development, AKA Farmers Bank for Investment and Rural Development, AKA Farmers Commercial Bank; State Trading Corporation, AKA State Trading Company; Sudan

Airways, AKA Sudan Airways Co. Ltd., AKA Sudan Air; Sudan Exhibition and Fairs Corporation; Sudan Advanced Railways; Sudan Cotton Company Limited; Sudan Development Corporation; Sudan Gezira Board, AKA Gezira Scheme; Sudan Master Tech, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Technology; Sudan Master Technology, AKA Giad Industrial City, AKA Giad Industrial Group, AKA Sudan Master Tech; Sudan National Broadcasting Corporation, AKA Sudan Radio & TV Corp., AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Oil Corporation; Sudan National Information Center; Sudan Olympic Committee; Sudan National Petroleum Company, AKA Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd.; Sudan Oil Seeds Company Limited; Sudan Petroleum Company Limited, AKA Sudapet, AKA Sudapet Ltd., AKA Sudan National Petroleum Company; Sudan-Ren Chemicals &Fertilizers Ltd.; Sudan Rural Development Company Limited; Sudan Radio & TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan T.V. Corporation; Sudan Soap Corporation; Sudan Radio and TV Corp., AKA Sudan National Broadcasting Corporation, AKA Sudan T.V. Corporation, AKA Sudan Radio & TV Corp.; Sudan Railways Corporation, AKA SRC; Sudan Shipping Line, AKA Sudan Shipping; Sudan T.V. Corporation, AKA Sudan National Broadcasting Corporation, AKA Sudan Radio and TV Corp., AKA Sudan Radio & TV Corp.; Sudan Tea Company, Ltd.; Sudan Telecom, AKA Sudan Telecom Group, AKA Sudatel Telecom Group, AKA Sudatel; Sudan Telecom Group, AKA

Sudan Telecom, AKA Sudatel Telecom Group, AKA Sudatel; Sudan Telecommunications Company Limited, AKA Sudatel; Sudatel Investments; Sudatel Telecom Group, AKA Sudatel, AKA Sudan Telecom Group; Sudatel, AKA Sudan Telecom, AKA Sudatel Telecom Group, AKA Sudan Telecom Group; Sudanese Estates Bank; Sudan Warehousing Company; Sudanese Company for Building and Construction Limited; Sudanese Free Zones and Markets Company, AKA SFZ; Sudanese International Tourism Company; Sudanese Real Estate Services Company; Sudanese Mining Corporation; Sudanese Petroleum Corporation; Sudanese Sugar Company, AKA Sudanese Sugar Production Company Limited; Sudanese Savings Bank; Sudanese Standards & Meterology Organization; Sudanese Sugar Production Company Limited, AKA Sudanese Sugar Company; Sudapet Ltd., AKA Sudan Petroleum Company Limited, AKA Sudan National Petroleum Company, AKA Sudapet; Sudapet, AKA Sudan Petroleum Company Limited, AKA Sudan National Petroleum Company, AKA Sudapet Ltd.; Sudatel, AKA Sudan Telecommunications Company Limited; Taheer Perfumery Corporation; Sugar and Distilling Corporation, AKA Sugar and Distilling Industry Corporation; Sugar and Distilling Industry Corporation, AKA Sugar and Distilling Corporation; Taka Automobile Company, AKA El Taka Automobile Company; Tea Packeting and Trading Company; Tahreer Perfumery Corporation; The Modern Laundry Blue Factory, AKA Modern Laundry Blue Factory; Tourism and Hotels Corporation; Wafra Pharma Laboratories, AKA Wafra Pharma

Laboratories, AKA Wafra Pharma Laboratories; Wau Fruit and Vegetable Canning Factory; White Nile Battery Company; Wad Madani Duty Free Shop; White Nile Petroleum Operating Company, AKA WNPOC; Wafra Chemicals & Techno-Medical Services Limited, AKA Wafra Chemicals & Techno-Medical Services Limited; and White Nile Tannery.

28 U.S.C. §1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. §1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

* * *

28 U.S.C. §1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD. —The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism

when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In

any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. §1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court

a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 27

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

3. The diplomatic bag shall not be opened or detained.

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy person inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers ad hoc. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Rule 4 of the Federal Rules of Civil Procedure
Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal

(2) *Amendments.* The court may permit a summons to be amended.

(b) ISSUANCE. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

* * *

(j) SERVING A FOREIGN, STATE, OR LOCAL GOVERNMENT.

(1) *Foreign State.* A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

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